No. 06-1505

In the Supreme Court of the United States

CLIFFORD B. MEACHAM, ET AL., PETITIONERS

v.

KNOLLS ATOMIC POWER LABORATORY, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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QUESTIONS PRESENTED

The Age Discrimination in Employment Act (ADEA) prohibits employment practices that have an unjustified disparate impact on older workers, *Smith* v. *City of Jackson*, 544 U.S. 228 (2005), but also provides that it "shall not be unlawful for an employer * * * to take any action otherwise prohibited * * * where the differentiation is based on reasonable factors other than age." 29 U.S.C. 623(f)(1). The questions presented are:

1. Whether an employee alleging disparate impact under the ADEA bears the burden of persuasion in establishing "reasonable factors other than age."

2. Whether an employer's practice of conferring broad discretionary authority upon individual managers to decide which employees to lay off during a reduction in force constitutes a "reasonable factor other than age."

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BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

This brief is submitted in response to the Court's order inviting the Solicitor General to express the views of the United States. In the view of the United States, the petition for a writ of certiorari should be granted, limited to the first question presented.

STATEMENT

1. Respondent Knolls Atomic Power Laboratory (KAPL) manages and operates a federally-owned research and development laboratory under contract with the Department of Energy. In 1996, in response to a staffing limit imposed by the government, KAPL instituted an involuntary reduction in force (IRIF). Pet. App. 5a, 39a. To implement the IRIF, respondent instructed managers in units that were over-budget to rate their employees from 0 to 10 on three factors—performance, flexibility, and the criticality of their skills—

and then add up to 10 points for years of service. After ranking employees based on their scores, managers were to identify for layoff the lowest-ranked employees. *Id.* at 5a-6a, 40a. Of the 31 employees selected for layoff pursuant to this procedure, 30 were over 40 years old. *Id.* at 6a, 40a. At the time of the layoff, approximately 60% of the workforce was over 40. *Id.* at 41a, 74a-75a.

To evaluate the results of the manager's selections, KAPL charged a review board with ensuring that the selections "adher[ed] to downsizing principles as well as minimal impact on the business and employees." Pet. App. 40a. The board did not, however, consider issues of age discrimination. *Id.* at 17a, 41a. KAPL's only analysis of the adverse impact of the layoff on older workers was a comparison of the average age of the workforce, which comprised approximately 2700 employees, before and after the IRIF. *Id.* at 17a, 40a-41a. KAPL's general manager and general counsel also reviewed the layoff lists by checking the math in the scoring and consulting with some managers to see that their decisions were "properly made" and "legitimate." *Id.* at 17a-18a, 41a (citation omitted).

2. Petitioners are former KAPL employees over the age of 40 who were laid off as a result of the IRIF. In 1997, they filed suit challenging their terminations under the Age Discrimination in Employment Act (ADEA), 29 U.S.C. 621 *et seq.*, and state law, alleging claims of both disparate treatment and disparate impact. In their answer, respondents pleaded as a defense that their alleged discrimination fell within ADEA's exception for employment actions based on "reasonable factors other than age" (RFOA), 29 U.S.C. 623(f)(1). Pet. App. 31a. The jury was instructed to evaluate petitioners' disparate-impact claims according to the burden-shifting anal-

ysis established by *Wards Cove Packing Co.* v. *Atonio*, 490 U.S. 642 (1989), under which the employee bears the ultimate burden of persuasion. See Pet. Supp. C.A. Br. 7-8 & Exh. A. Respondents did not, however, seek a jury instruction specifically concerning their RFOA defense, and no instruction was given concerning which party bore the burden of proof as to RFOA. See Pet. App. 31a. The jury found for respondents on the disparate-treatment claims, but for petitioners on the disparate-impact claims. *Id.* at 45a, 75a-76a. The district court denied respondents' motion for judgment as a matter of law. *Id.* at 77a-102a, 153a.

The court of appeals affirmed. Pet. App. 33a-69a. The court analyzed the jury's disparate-impact verdict by employing the burden-shifting framework set out in *Wards Cove*, in the context of disparate-impact claims brought under Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.* Pet. App. 54a-63a; see *id.* at 7a-8a. Under that framework, a plaintiff makes a prima facie case of disparate-impact discrimination by showing that a specific employment practice or policy had a significant disparate impact on a protected group. *Wards Cove*, 490 U.S. at 656-658. The burden then shifts to the employer to produce evidence of a business justification for the challenged practice. *Id.* at 659. Once such evidence is produced, the plaintiff bears the burden of persuading the factfinder that the asserted business justification is merely a pretext for discrimination. The plaintiff may sustain that burden by showing that "other tests or selection devices, without a similarly undesirable [discriminatory] * * * effect, would also serve the employer's legitimate [business] interest." *Id.* at 660 (citation omitted).

Applying that framework to this case, the court of appeals held that petitioners adequately identified a specific employment practice—the "unaudited and heavy reliance on subjective assessments of 'criticality' and 'flexibility,'" Pet. App. 60a—and proved that it caused a substantial adverse impact based on age. *Id.* at 59a. The court also determined that respondents offered a facially legitimate business justification for the IRIF: "to reduce its workforce while still retaining employees with skills critical to the performance of KAPL's functions." *Ibid.* (citation omitted). The court concluded that petitioners nevertheless prevailed at the final step of the *Wards Cove* analysis, because "[a]t least one suitable alternative" practice was clear from the record: KAPL could have designed an IRIF with "tests for criticality and flexibility that were less vulnerable to managerial bias." *Id.* at 60a-61a & n.8.

Respondents petitioned for a writ of certiorari. In their petition, they sought review both of the court of appeals' conclusion that a disparate-impact age discrimination claim is available under the ADEA, and of the evidentiary standards the court applied in analyzing petitioner's claim in this case. Shortly thereafter, this Court issued its decision in *Smith* v. *City of Jackson*, 544 U.S. 228 (2005), in which it held that disparate-impact claims are cognizable under the ADEA. Following that decision, this Court granted the writ of certiorari in this case, vacated the judgment of the court of appeals, and remanded for further proceedings. 544 U.S. 957 (2005).

3. On remand, a divided panel of the Second Circuit vacated the judgment of the district court and remanded the case with instructions to enter judgment for respondents. Pet. App. 1a-32a. The court concluded that the analysis it had employed in its earlier decision was now

"untenable" because, in *Smith*, the Supreme Court concluded that the business necessity test applicable in Title VII disparate-impact cases "is not applicable in the ADEA context." *Id.* at 9a (citing *Smith*, 544 U.S. at 243). Instead, the court of appeals explained, the "appropriate test [under *Smith*] is for 'reasonableness,' such that the employer is not liable under the ADEA so long as the challenged employment action, in relying on specific non-age factors, constitutes a reasonable means to the employer's legitimate goals." *Ibid.* The court noted that the "reasonableness" test described in *Smith* "is derived primarily from" the provision of the ADEA that provides that "[i]t shall not be unlawful for an employer * * * to take any action otherwise prohibited * * * where the differentiation is based on reasonable factors other than age." *Id.* at 9a-10a & n.4 (quoting 29 U.S.C. 623(f)(1)).

In applying the "reasonableness" test to petitioners' disparate-impact claims, the court held, as a preliminary matter, that the ADEA plaintiff bears the burden of persuading the factfinder that the employer's justification is unreasonable. Pet. App. 11a. The court based this holding on three considerations: (1) that *Smith* did not suggest that defendants must prove the RFOA, *id.* at 11a-12a; (2) that "[a]ny other interpretation would compromise the holding in *Wards Cove* that the employer is not to bear the ultimate burden of persuasion with respect to the 'legitimacy' of its business justification," *id.* at 12a; and (3) that, because there may be a correlation between age and certain reasonable employment criteria, it "would seem redundant to place on an employer the burden of demonstrating that routine and otherwise unexceptionable employment criteria are reasonable," *id.* at 12a-13a.

The court of appeals concluded that respondents met their burden of producing evidence of a legitimate business justification not only for the IRIF, but also for the specific employment practice challenged by the plaintiffs. Pet. App. 15a. Specifically, the court found that respondents discharged their burden by presenting testimony that criteria such as flexibility and criticality were "ubiquitous components of 'systems for making personnel decisions,'" and that "the managers conducting the evaluations were knowledgeable about the requisite criteria and familiar with the capabilities of the employees subject to evaluation." *Id.* at 16a.

The court of appeals concluded that petitioners did not, however, sustain their burden. The court noted that the reasonableness inquiry described in *Smith*, unlike the business-necessity inquiry applicable in the Title VII context, does not ask "whether there are other ways for the employer to achieve its goals that do not result in a disparate impact on a protected class." Pet. App. 16a (quoting *Smith*, 544 U.S. at 243). While "[t]here may have been other reasonable ways for [respondent] to achieve its goals," the court concluded that petitioners had not demonstrated that "the one selected" was "unreasonable." *Id.* at 19a (citations omitted).

Judge Pooler dissented. Pet. App. 21a-32a. In her view, "existing cases, legislative history, and statutory structure overwhelmingly support the view that employers bear the burden of establishing a RFOA." *Id.* at 25a. She concluded that Congress's inclusion of the RFOA provision among the other exceptions to liability outlined in 29 U.S.C. 623(f), including circumstances in which "age is a bona fide occupational qualification reasonably necessary to the normal operation of the particular business," 29 U.S.C. 623(f)(1), indicates that RFOA,

like the "bona fide occupational qualification" (BFOQ) defense, is an affirmative defense as to which the defendant bears the burden of proof. Pet. App. 26a-30a.

DISCUSSION

A. Certiorari Is Warranted To Clarify Which Party Bears The Burden Of Proof On The ADEA's RFOA Exception

The court of appeals held that plaintiffs raising a disparate-impact age discrimination claim bear the burden of proof with respect to the ADEA's RFOA exception. That ruling is at odds with the text of the pertinent statutory provision, the decisions of other circuits, and agency regulations. In addition, the burden of proof on this issue is of threshold and recurring importance in ADEA disparate-impact cases. This Court's review of the first question presented is therefore warranted.

1. a. The ADEA's RFOA provision provides, in pertinent part: "It shall not be unlawful for an employer * * * to take any action otherwise prohibited * * * where age is a bona fide occupational qualification reasonably necessary to the normal operation of the particular business, or where the differentiation is based on reasonable factors other than age." 29 U.S.C. 623(f)(1). The most natural construction of Section 623(f)(1) is that this exception for actions "otherwise prohibited" by Sections 623(a), (b), (c) and (e) of the statute constitutes an affirmative defense that comes into play only after the plaintiff has established that the employer has taken action that has a significant adverse effect on older workers, and permits the defendant to escape liability only if it can persuade the factfinder that its actions were justified or excusable.

This Court has recognized that the RFOA provision's neighboring exception in Section 623(f)(1) for actions

"otherwise prohibited" "where age is a bona fide occupational qualification reasonably necessary to the normal operation of the particular business" is an affirmative defense, *Smith*, 544 U.S. at 233 n.3, to be established by the employer, *Western Air Lines, Inc.* v. *Criswell*, 472 U.S. 400, 416-417 & n.24 (1985); cf. *International Union* v. *Johnson Controls, Inc.*, 499 U.S. 187, 206 (1991) (holding that defendant has the burden of proving a BFOQ under the similar language in Section 703(f)(1) of Title VII); *id.* at 221-222 (White, J., concurring). The courts of appeals have similarly characterized other exceptions appearing in Section 623(f) as affirmative defenses. See Pet. App. 28a-29a (Pooler, J., dissenting) (citing cases). Congress's placement of the RFOA exception among those exemptions from liability for actions "otherwise prohibited" by the substantive liability provisions of the statute strongly indicates that the RFOA, too, is an affirmative defense as to which the employer bears the burden of persuasion. See, *e.g.*, *Gustafson* v. *Alloyd Co.*, 513 U.S. 561, 575 (1995) ("[A] word is known by the company it keeps.").[1]

Likewise, this Court has interpreted the similarly-worded exception in another employment discrimination statute, the Equal Pay Act of 1963, 29 U.S.C. 206(d)(1), to establish an "affirmative defense on which the em-

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[1] As this Court long ago recognized, "the burden of proving justification or exemption under a special exception to the prohibitions of a statute generally rests on one who claims its benefits." *FTC* v. *Morton Salt Co.*, 334 U.S. 37, 44-45 (1948); see *Schaffer ex rel. Schaffer* v. *Weast*, 546 U.S. 49, 57 (2005) ("[T]he burden of persuasion as to certain elements of a plaintiff's claim may be shifted to defendants, when such elements can fairly be characterized as affirmative defenses or exemptions."). As noted, in this case, respondents pleaded the RFOA exception as a defense in their answer. Pet. App. 31a.

ployer has the burden of proof." *Corning Glass Works* v. *Brennan*, 417 U.S. 188, 196-197 (1974); see 29 U.S.C. 206(d)(1) (creating an exception to liability for differential pay "based on any other factor other than sex"); see also *Smith*, 544 U.S. at 239 n.11 (plurality opinion) (noting similarity, and one key difference, between the Equal Pay Act defense and the ADEA defense). As this Court has recognized, "when Congress uses the same language in two statutes having similar purposes, particularly when one is enacted shortly after the other, it is appropriate to presume that Congress intended that text to have the same meaning in both statutes." *Smith*, 544 U.S. at 233 (plurality opinion) (citing *Northcross* v. *Board of Ed. of Memphis City Schs.*, 412 U.S. 427, 428 (1973) (per curiam)). Like the Equal Pay Act, the ADEA assigns to employers the burden of establishing that otherwise unlawful actions are justified by factors other than discrimination against protected groups.

b. Consistent with the statutory language, the agencies responsible for enforcement of the ADEA have long interpreted the RFOA as an affirmative defense, with the burden of persuasion resting on the employer. In 1968, less than one year after passage of the ADEA, the Department of Labor (DOL), the agency then charged with enforcing the statute, promulgated a regulation providing that, "in accord with a long chain of decisions of the Supreme Court * * * with respect to other remedial labor legislation, all exceptions such as [RFOA] must be construed narrowly, and the burden of proof in establishing the applicability of the exception will rest upon the employer." 29 C.F.R. 860.103(e) (1969).

When the Equal Employment Opportunity commission (EEOC) assumed responsibility for ADEA enforcement in 1979, it continued to construe the RFOA provi-

sion as an affirmative defense, as to which the employer bears the burden of proof. See 29 C.F.R. 1625.7(e) ("[T]he employer bears the burden of showing that the [RFOA] exists factually."); *Proposed Interpretations; Age Discrimination Employment Act*, 44 Fed. Reg. 68,861 (1979) ("The burden of proof in establishing that the differentiation was based on factors other than age is upon the employer.").[2]

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[2] By its terms, 29 C.F.R. 1625.7(e) applies "[w]hen the exception of 'a reasonable factor other than age' is raised against an individual claim of discriminatory treatment." A separate subsection of the RFOA regulation provides: "When an employment practice, including a test, is claimed as a basis for different treatment of employees or applicants for employment on the grounds that it is a 'factor other than' age, and such a practice has an adverse impact on individuals within the protected age group, it can only be justified as a business necessity." 29 C.F.R. 1625.7(d). The court of appeals concluded (Pet. App. 13a n.6), based on this regulatory language, that the EEOC's interpretation of the RFOA provision as an affirmative defense to be established by the employer applies only in disparate-treatment cases, and not disparate-impact cases. The court of appeals' conclusion is incorrect.

There is no indication in either the statutory or the regulatory text that Congress or the EEOC intended there to be one burden of proof with respect to the RFOA provision in the disparate-treatment context and another in the disparate-impact context. From the outset, EEOC has made clear that the employer bears the burden of establishing RFOA in any age-discrimination case. 44 Fed. Reg. at 68,861. The current version of Section 1625.7(d) is simply the product of revisions intended "to make it clear that employment criteria that are age-neutral on their face but which nevertheless have a disparate impact on members of the protected age group must be justified as a business necessity." *Final Interpretations: Age Discrimination in Employment Act*, 46 Fed. Reg. 47,725 (1981). Although this Court later held that the plaintiff bears the burden of persuading the factfinder on the question of business necessity in a Title VII disparate-impact case, see *Wards Cove*, 490 U.S. at 659-660, the EEOC has continued to interpret the statute and regulations to make the ADEA's RFOA provision an affirmative defense as to which the employer bears the burden of persua-

To the extent there is any ambiguity in the statutory language of the ADEA, DOL's and EEOC's longstanding interpretation of the RFOA provision as an affirmative defense is entitled to deference. See, *e.g.*, *EEOC* v. *Commercial Office Prods.*, 486 U.S. 107, 115 (1988) (holding that the EEOC's reasonable interpretation of ambiguous language in Title VII warrants deference); accord *Smith*, 544 U.S. at 243 (Scalia, J., concurring). Deference is particularly appropriate where, as here, the interpretation is set forth in a regulation that was adopted soon after passage of the statute and has remained consistent thereafter. See *EEOC* v. *Associated Dry Goods Corp.*, 449 U.S. 590, 600 n.17 (1981).

The EEOC has, moreover, consistently interpreted its regulations as assigning to the employer the duty to establish the applicability of the RFOA provision in both disparate-treatment and disparate-impact cases. See Gov't Br. as Amici Curiae Supporting Resp. at 23-27, *Western Air Lines, Inc.* v. *Criswell*, 472 U.S. 400 (1985) (No. 83-1545); EEOC Br. as Amicus Curiae at 5, 11, *Smith* v. *City of Des Moines*, 99 F.3d 1466 (8th Cir. 1996) (No. 95-3802). In this case, the EEOC filed an amicus brief in the court of appeals in which it made clear that, under EEOC regulations, the RFOA provision is "an affirmative defense that the employer must establish." EEOC C.A. Br. 15. The EEOC's interpretation of its regulations, as explained in its amicus brief in this and other cases, is entitled to deference. See *Auer*

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sion. See pp. 11-12, *infra*. Moreover, that the regulation is written in an awkward fashion or even mistaken in some other particular is not a reason to ignore the EEOC's clear and consistent position that the burden of persuasion quite naturally lies with the defendant. See *Smith*, 544 U.S. at 247 (Scalia, J., concurring).

v. *Robbins*, 519 U.S. 452, 462 (1997); *Bowles* v. *Seminole Rock & Sand Co.*, 325 U.S. 410, 414 (1945).[3]

c. Although the court of appeals acknowledged that "there is some force" to the argument that the RFOA provision should be interpreted as an affirmative defense to be established by the employer, Pet. App. 13a, it held that this interpretation "does not withstand" this Court's decision in *Smith*, *id.* at 13a-14a.

In *Smith*, the Court considered the viability of a disparate-impact claim brought by senior police officers who were challenging a pay plan that granted proportionately higher raises to junior officers. In affirming dismissal of the claim, the Court held that disparate-impact claims are cognizable under the ADEA, but that the scope of ADEA disparate-impact liability "is narrower" than under Title VII, as amended by the Civil Rights Act of 1991. 544 U.S. at 238-242. The Court pointed in particular to two textual differences between Title VII and the ADEA. First, the Court noted that, after *Wards Cove*, Congress had amended Title VII to

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[3] Respondents contend that EEOC's views are not entitled to deference because *Smith* "effectively rejected" its regulations, and the EEOC "has reported publicly that it intends to revise its regulations * * * to conform to the decision in [*Smith*]." Br. in Opp. 20-21. This is incorrect. Although *Smith* does cast doubt on the language in 29 C.F.R. 1625.7(d) stating that a practice shown to have a disparate impact "can only be justified as a business necessity," see *Smith*, 544 U.S. at 243, it casts no doubt on the position of the EEOC and the DOL that the employer bears the burden of persuasion with respect to the RFOA provision. Cf. *Smith*, 544 U.S. at 247 (Scalia, J., concurring). The EEOC is in the process of reconsidering its regulations in light of issues related to *Smith*, but to be clear, the agency's position remains that the RFOA provision is an affirmative defense that the employer must establish. That the EEOC is considering whether other revisions to its regulations would be appropriate in light of *Smith* provides no reason to defer consideration of the first question presented by this case.

expand the scope of disparate-impact liability under that statute, but made no similar amendment to the ADEA. Accordingly, the Court stated, "*Wards Cove*'s pre-1991 interpretation of Title VII's *identical language* remains applicable to the ADEA." *Id.* at 240 (emphasis added). Second, the Court noted that the ADEA contains the RFOA provision, which has no parallel in Title VII. *Id.* at 238-239. In the Court's view, these textual differences suggest that Congress intended to "give older workers employment opportunities whenever possible" but also recognized that age, unlike race or sex, "not uncommonly has relevance to an individual's capacity to engage in certain types of employment," and "certain employment criteria that are routinely used may be reasonable despite their adverse impact on older workers as a group." *Id.* at 240-241.

Turning to the facts in *Smith*, the Court concluded that plaintiffs could not make out a prima facie case because they failed to identify a specific employment practice that adversely affected older workers. 544 U.S. at 242. But even if they had, the Court concluded that dismissal of that action was appropriate because, in light of the employer's legitimate goals of attracting and retaining officers, the challenged practice was "unquestionably reasonable." *Id.* at 242.

Although *Smith* suggests that the business-necessity test is inapplicable to ADEA disparate-impact claims in which the RFOA provision may apply, *Smith* does not suggest, much less hold, that the plaintiff must bear the burden of persuasion with respect to the RFOA provision. As the court of appeals itself recognized (Pet. App. 11a-12a), given the obvious fit between the employer's goals and the means selected to achieve them, the Court in *Smith* had no occasion to resolve the question of

which party bears the burden of proof with respect to the RFOA provision, and nothing in the Court's decision proposes to resolve the issue.

Nor does *Smith*'s discussion of the textual differences between Title VII and the ADEA suggest a particular allocation of the burden of persuasion with respect to the ADEA's RFOA provision. *Smith*'s reference to *Wards Cove* sheds no light on that question, since, as the Court explicitly noted, Title VII—the statute at issue in Wards Cove—contains no analog to the ADEA's RFOA provision. 544 U.S. at 240. Accordingly, although *Wards Cove* may have continued significance in ADEA cases such as this one on matters such as the specificity of the practice challenged as having a disparate impact, the impact of the RFOA provision is not dictated by that decision.

And although the relationship between age and capacity to participate in certain types of employment may explain why Congress included an RFOA provision in the ADEA and not Title VII, see *Smith*, 544 U.S. at 240-241, that relationship has "no bearing on where the RFOA burden should rest," Pet. App. 31a (Pooler, J., dissenting). If anything, Congress's decision to include the RFOA exception provides a clear answer to the burden of proof question relative to Title VII, which lacked an analogous provision. After all, in contrast to the Court's efforts to allocate burdens of proof in the absence of clear textual directives in a case like *Wards Cove*, when the Court construed an analogous textual defense in Title VII, it had little difficulty concluding that the defendant bore the burden. See, *e.g.*, *Johnson Controls*, 499 U.S. at 206.

2. The Court's review of the first question presented is also warranted because several courts of appeals are

divided on this question. Like the court of appeals in this case, the Tenth Circuit has held in the wake of *Smith* that plaintiffs must "persuade the factfinder that the employer's asserted basis for the [challenged] neutral policy is *unreasonable*." *Pippin* v. *Burlington Res. Oil & Gas Co.*, 440 F.3d 1186, 1200 (10th Cir. 2006); see Pet. App. 11a (citing *Pippin* for support).[4] At least two other circuits have held that the employee bears the burden of persuasion with respect to the RFOA exception, although they did so in cases involving disparate treatment and had no occasion to apply that holding in the disparate-impact context. See, *e.g.*, *Iervolino* v. *Delta Air Lines, Inc.*, 796 F.2d 1408, 1416 (11th Cir. 1986); *Marshall* v. *Westinghouse Elec. Corp.*, 576 F.2d 588, 590-592 (5th Cir. 1978).

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[4] Only two post-*Smith* appellate decisions, *Meacham* and *Pippin*, squarely place the burden of proving RFOA on plaintiffs. Respondents' citation to *Mattenson* v. *Baxter Healthcare Corp.*, 438 F.3d 763 (7th Cir. 2006), is inapposite. That case was tried to a jury under a disparate-treatment theory. The Seventh Circuit held, citing *Smith*, that under those circumstances it was error to instruct the jury on the RFOA exception. *Id.* at 767; see *Smith*, 544 U.S. at 238-239 ("In most disparate-treatment cases, if an employer in fact acted on a factor other than age, the action would not be prohibited under subsection (a) in the first place."). The court in *Mattenson* thus had no occasion to determine which party bears the burden of proving RFOA. The unpublished decisions in *Seasonwein* v. *First Montauk Sec. Corp.*, 189 Fed. Appx. 106 (3d Cir. 2006), and *Durante* v. *Qualcomm, Inc.*, 144 Fed. Appx. 603 (9th Cir. 2005), cited by respondents (Br. in Opp. 15-17), are also inapposite. In *Seasonwein*, the Third Circuit upheld the dismissal of the plaintiff's disparate-impact claim because he had failed to plead such a claim in his complaint, and did not reach the question of allocation of burdens with respect to the RFOA provision. 189 Fed. Appx. at 111. The Ninth Circuit in *Durante* had no occasion to decide the question of allocation of burdens because the employer's evidence of reasonableness in that case was unrebutted. 144 Fed. Appx. at 607.

By contrast, the Ninth Circuit has held that the employer bears the burden of establishing RFOA under the ADEA, just as it bears the burden with respect to the BFOQ provision. See *Criswell* v. *Western Airlines, Inc.*, 709 F.2d 544, 552 (9th Cir. 1983). Respondents suggest (Br. in Opp. 16-17) that *Criswell* has been "effectively overruled" by later circuit precedent, *Durante* v. *Qualcomm*, 144 Fed. Appx. 603 (9th Cir. 2005), but that decision is unpublished (and thus non-precedential), and does not address the proper allocation of burdens as to the ADEA's RFOA provision.[5]

3. The question of the proper allocation of the burden of proof as to the RFOA exception is important and recurring. Indeed, this Court granted certiorari to address this issue in *Criswell*, but did not reach the issue because it determined that it was not properly presented in this case. 472 U.S. at 408 n.10; see Br. of AARP and the National Employment Lawyers Association as *Amicus Curiae* M-2 to M-3; *Speiser* v. *Randall*, 357 U.S. 513, 525 (1958) ("In all kinds of litigation it is plain that where the burden of proof lies may be decisive of the outcome."). In addition, the court of appeals' deci-

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[5] As petitioners note, there is also language in cases from other circuits suggesting that establishing RFOA is defendant's burden. See, *e.g.*, *Laugesen* v. *Anaconda Co.*, 510 F.2d 307, 315 (6th Cir. 1975) (dicta citing Department of Labor regulation for view that employer had duty to prove RFOA where policy has disparate impact on older people). Although respondents contend that a later Sixth Circuit case, *Abbott* v. *Federal Forge, Inc.*, 912 F.2d 867 (6th Cir. 1990), "supports the view that an employer's burden in a disparate impact case under the ADEA is one of production only and not one of proof," Br. in Opp. 17, the Sixth Circuit in *Abbott* held, based on Supreme Court precedent, that an employer's burden of establishing *business necessity* is one of production only; it did not address the allocation of burdens with respect to *RFOA*. See *Abbott*, 912 F.2d at 872.

sion in this case rejects the longstanding administrative interpretation of the ADEA by the agencies charged with implementing the statute. Moreover, given that the courts of appeals that have placed the burden of proof on the plaintiff despite strong textual indications and administrative constructions to the contrary have all relied heavily on language from this Court's decision in *Smith*, intervention by the Court is necessary. If left unreviewed, the court of appeals' decision could upset the enforcement of the ADEA by limiting remedies for employment practices that have a disparate adverse impact on older workers, even if those practices have only a marginal relationship to an asserted business purpose.

4. This case is a suitable vehicle for resolving which party bears the burden of establishing RFOA, despite the fact that the case was framed and tried to the jury before *Smith*. A jury found that respondents were liable under the ADEA under a disparate-impact theory in connection with the loss of their jobs under an involuntary reduction in force in which 30 out of the 31 employees selected for layoff were over 40 years of age. Pet. App. 6a. The court of appeals initially affirmed the district court's denial of respondents' motion for judgment as a matter of law, but following a remand from this Court in light of *Smith*, the court of appeals—by a 2-1 vote—vacated the judgment of the district court and remanded with instructions to enter judgment as a matter of law in favor of respondents. A central point of disagreement among the panel was the allocation of the burden of proof on the RFOA exception. See *id.* at 11a-15a (panel majority); *id.* at 25a-31a (dissent). And the panel majority—which placed the burden of proof on the employee—acknowledged that there was evidence both ways. See *id.* at 16a-19a; see also *id.* at 32a (Pooler, J.,

dissenting) (a jury instructed that respondents bore the burden of proof on the RFOA defense "could permissibly find that [respondents] had not established a RFOA based on the unmonitored subjectivity of KAPL's plan as implemented").

As respondents note (Br. in Opp. 18-20), petitioners did not argue that respondents bore the burden of persuading the factfinder that the design and execution of the IRIF was based on RFOA. See Pet. Supp. C.A. Br. 13-14. Likewise, as the dissent notes (Pet. App. 31a-32a), although respondents pleaded RFOA as a defense, the jury was not specifically instructed on the issue, and respondents sought no such instruction.[6] However, the

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[6] As noted above, see pp. 2-3, *supra*, the jury was instructed, consistent with *Wards Cove*, that petitioners bore the burden of persuading the factfinder that respondents' asserted business justification was in fact a pretext for discrimination, and that petitioners could satisfy that burden by proving that an alternative employment practice would have been equally effective in achieving respondents' legitimate business objectives. After this Court remanded the case for reconsideration in light of *Smith*, the court of appeals held that the framework set out in the jury instructions was no longer good law. Pet. App. 10a. Given that change in the law, the court proceeded to consider the "reasonableness" of respondents' asserted business justification under the RFOA exception, and somewhat anomalously found the *Smith* decision to require setting aside the jury's verdict in favor of the plaintiff that had been affirmed pre-*Smith*. *Id.* at 11a-19a.

In dissent, Judge Pooler asserted that respondents' failure to seek a jury instruction on the RFOA exception constituted waiver of that argument, absent "fundamental error." Pet. App. 31a. Judge Pooler acknowledged, however, that the question whether respondents' failure to seek an RFOA instruction constitutes waiver of the argument turns on whether the RFOA exception is properly characterized as an affirmative defense that is the employer's burden to establish. *Id.* at 31a-32a. And assuming the RFOA exception is an affirmative defense, petitioners should not be faulted for not objecting to the *absence* of a RFOA instruction (including an instruction on the burden of proving

proper allocation of burdens with respect to the RFOA provision was addressed in the amicus brief filed by the EEOC and, more to the point, the court of appeals squarely addressed the issue in its opinion. Pet. App. 11a. Reviewing the record, the court determined that respondents had raised a legitimate, non-age-based justification for its challenged employment practices, and that plaintiffs had not satisfied their burden of demonstrating that the justification was unreasonable. See *id.* at 11a-19a. In this Court, petitioners have clearly presented the question whether the employer, or employee, bears the burden of persuasion on the RFOA exception, Pet. i, and argued that the court of appeals erred in assigning the burden to them. In addition, that issue is squarely contested by the parties in this Court. Review is therefore appropriate. See *United States* v. *Williams*, 504 U.S. 36, 42, 43 (1992).

B. Certiorari Is Not Warranted To Decide Whether The Exercise Of Supervisorial Discretion Constitutes A RFOA As A Matter Of Law

The petition raises a second question as to whether conferring discretion on managers to make employment decisions constitutes a RFOA as a matter of law. This Court's review of that question is not warranted.

Contrary to petitioners' argument, the court of appeals decision on this issue does not conflict with this Court's decision in *Watson* v. *Fort Worth Bank & Trust*, 487 U.S. 977 (1988). *Watson* was a Title VII case in which this Court held that "subjective or discretionary

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the RFOA exception). Ultimately, the court of appeals set aside the jury verdict based on its conclusion that, regardless of how the jury was instructed, petitioners bore the burden of disproving the RFOA. The correctness of that ruling is squarely before the Court.

employment practices may be analyzed under the disparate impact approach in appropriate cases." *Id.* at 991. The court of appeals' decision does not establish a general legal principle that subjective or discretionary employment practices fall outside the reach of disparate-impact theory; it instead holds, based on the present record, that the measures that respondents employed to prevent arbitrary decisionmaking, "while not foolproof[,] were substantial," and therefore satisfy the reasonableness test as the court of appeals understood it. Pet. App. 19a; see also *id.* at 9a ("[T]he appropriate test is for 'reasonableness,' such that the employer is not liable under the ADEA so long as the challenged employment action, in relying on specific non-age factors, constitutes a reasonable means to the employer's legitimate goals."). In addition, the court of appeals' decision does not conflict with any other circuit decision on this issue.

Petitioners focus on (Pet. 26-28) the court of appeals' statement that "[a]ny system that makes employment decisions in part on such subjective grounds as flexibility and criticality * * * advances business objectives that will usually be reasonable"—"at least to the extent that the decisions are made by managers who are in day-to-day supervisory relationships with their employees." Pet. App. 19a. But the remainder of the pertinent discussion makes clear that the court properly recognized that the reasonableness inquiry requires consideration of the reasonableness of both ends and means. In any event, the second question presented is fact-bound and splitless, and does not warrant plenary review.

CONCLUSION

The petition for a writ of certiorari should be granted, limited to the first question presented.

Respectfully submitted.

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